HAVE WE TRAVELED TOO FAR?: THE RISE OF THE TRAVEL ACT IN HEALTH CARE CORRUPT PAYMENT CASES

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I. Introduction

In 2019, the Department of Justice (DOJ) expressly denounced medical professionals and executives who solicit or receive corrupt payments.[1] In the DOJ's view, these white-collar health care crimes are not victimless; they are indeed just as nefarious as any other criminal action.[2] In fact, the DOJ believes these crimes cost American health care programs billions of dollars and announced that it will not tolerate health care providers who look to personally benefit from cheating the United States' people and health care programs.[3] Given the gravity of this issue, subsequent health risks to Americans, and the financial cost to the American health care system, the United States government, federal agencies, and state governments have pursued corrupt payments, such as illegal kickbacks and bribes, as aggressively as they have pursued health care fraud and abuse.[4] There is little chance that federal agencies, especially the DOJ, will cease their intense enforcement actions in the future.[5]

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[1] *See generally* Press Release, Dep't. of Just., Federal Indictments & Law Enforcement Actions in One of the Largest Health Care Fraud Schemes Involving Telemedicine and Durable Medical Equipment Marketing Executives Results in Charges Against 24 Individuals Responsible for Over $1.2 Billion in Losses (Apr. 9, 2019), https://www.justice.gov/opa/pr/federal-indictments-and-law-enforcement-actions-one-largest-health-care-fraud-schemes.

[2] *Id*.

[3] *Id*.

[4] Although fraud and abuse are often used interchangeably, there is a slight distinction. Fraud denotes deception and misrepresentations in order to benefit oneself, while abuse is when one engages in practices that are not sound, or fail to meet the standard of care. *See generally*, ALICE G. GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE § 1:2, Westlaw (database updated July 2020).

[5] *See* Melissa Jampol & George Breen, *DOJ's Health Care Enforcement Initiative Is Still Going Strong*, LAW360 (July 19, 2018, 2:33 PM),

Although most health care providers generally engage in ethical behavior and provide high-quality patient-centric care, lawmakers realize that some unscrupulous providers attempt and sometimes succeed in exploiting government health care programs for their personal gain.[6] The federal government has an interest in deterring illicit health care payments and activities, as it funds and runs six major health care programs.[7]

In response, Congress enacted a full battery of statutes regulating the health care system, including but not limited to: the federal Anti-Kickback Statute (AKS), the Health Care Fraud Statute, the False Claims Act, Exclusion Provisions, and the Civil Monetary Penalties law.[8] Despite the number of federal health care fraud statutes, there is a noticeable gap in regulation of health care professionals soliciting or receiving corrupt payments for business referrals, goods, or services that are reimbursable under private insurance.[9] Ultimately, this creates an obstacle for complete and successful regulation of health care providers.

This gap in regulation becomes increasingly apparent in instances where health care providers have restructured their practices to exclude patients enrolled in government-payor programs and only accept patients with private-payor insurance.[10] Government-payor programs cover approximately one-third of Americans, so one would think that it would be advantageous for health care providers to accept

https://www.law360.com/articles/1064720/doj-s-health-care-enforcement-initiative-is-still-going-strong.

[6] CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T. HEALTH & HUM. SERVS., LAWS AGAINST HEALTH CARE FRAUD RESOURCE GUIDE 1 (2014), http://www.healthsmartmso.com/downloadfile/FWA/Care1stFWA/11%20-%20FWA-Law%20Against%20Health%20Care%20Fraud.pdf.

[7] COMM. ON ENHANCING FED. HEALTHCARE QUALITY PROGRAMS & INST. OF MED., LEADERSHIP BY EXAMPLE: COORDINATING GOVERNMENT ROLES IN IMPROVING HEALTH CARE QUALITY, 3 (Janet M. Corrigan et al. eds., Nat'l Acad. Press 2003). The six major health care programs funded by the federal government are: Medicare, Medicaid, the State Children's Health Insurance Program, the Department of Defense TRICARE and TRICARE for Life programs, the Veterans Health Administration, and the Indian Health Service Program; *Id* at 2.

[8] *See* 42 U.S.C. § 1320a-7b (2018); 18 U.S.C. § 1347 (2010); 31 U.S.C. § 3729 (2009); 42 U.S.C. § 1320a-7 (1990); 42 U.S.C. § 1320a-7a (1998); DEP'T. OF HEALTH AND HUMAN SERVICES, *supra* note 6 at 1.

[9] Private health insurance providers include Humana, Cigna Health, and United Health. *See* Alex Flitton, *Top 25 Health Insurance Companies in the U.S.*, PEOPLEKEEP BLOG (JAN. 13, 2020, 4:09 PM), https://www.peoplekeep.com/blog/top-25-health-insurance-companies-in-the-u.s.

[10] Private health insurance is purchased through companies such as United Health, Humana, Blue Cross Blue Shield, among others. This is not an exhaustive list of private health insurance providers. *See* Susan Smith, *The Travel Act: Enforcing Prohibitions Against Referrals Through State Bribery Laws*, WOLTERS KLUWER: HEALTH LAW DAILY WRAP UP (June 2, 2018) at 2.

beneficiaries from the six major government-payor programs: Medicare, Medicaid, the State Children's Health Insurance Program, the Department of Defense TRICARE and TRICARE for Life programs, the Veterans Health Administration, and the Indian Health Services program.[11] However, health care entities that accept government-payor program benefits experience increased legal scrutiny and are within federal jurisdiction under statutes such as the Anti-Kickback Statute(AKS), the False Claims Act, Stark Law, Exclusion Statute, and Civil Monetary Penalties Law.[12]

When health care practitioners exclude government-payor program beneficiaries to escape possible legal sanctions, certain health care statutes, such as the federal Anti-Kickback Statute, are rendered ineffective, potentially placing illicit payment structures out of prosecutorial reach.[13] The AKS prohibits and criminalizes transactions inducing or rewarding referrals for items and services billed to federal payor programs, and prohibits knowingly and willfully soliciting or receiving any remuneration in return for referring an individual to a service compensable under a federal health care program or purchasing any item compensable under a federal health care program.[14] In addition, the AKS prohibits knowingly or willfully offering or paying any remuneration to a person for the same purpose of inducing services or items payable under a federal payor program.[15] Since the AKS explicitly requires the remuneration in exchange for referrals of business, goods, and services to be one that is compensable *under a federal health care program*, the federal Anti-Kickback Statute becomes ineffective where no federal payor programs are affected.

Congress recognized this limit on its traditional conduits for health care prosecutions, and recently enacted the Eliminating Kickbacks and Recovery Act (EKRA) to help eliminate corrupt payment practices, as well as to stop patient brokers who profit from the nationwide opioid epidemic.[16] EKRA prohibits the knowing and willful solicitation,

[11] *See Health Insurance Coverage of the Total Population*, THE KAISER FAMILY FOUNDATION, https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#; NANCY NILES, BASICS OF THE U.S. HEALTH CARE SYSTEM, 206-09 (3d ed. 2016).

[12] Center for Medicare & Medicaid Services, *Medicare Fraud & Abuse: Prevent, Detect, Report* (Feb. 2019), https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/Fraud-Abuse-MLN4649244.pdf.

[13] 42 U.S.C. § 1320a-7b.

[14] 42 U.S.C. § 1320a-7b(b)(1).

[15] 42 U.S.C. § 1320a-7b(b)(2).

[16] 64 Cong. Rec. H9244 (daily ed. Sept. 28, 2018) (statement of Rep. Frank Pallone) (explaining that patient brokers are individuals who target those with opioid use

receiving, paying, or offering renumeration, "directly or indirectly, . . . in return for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory" if those services are covered by a health care benefit program.[17] EKRA's statutory language is intentionally broader than AKS and is meant to address the current gap in prosecuting corrupt payments involving private insurance.[18] However, EKRA still falls short of fully covering the existing prosecutorial gap. Specifically, EKRA is ineffective in instances where there is no recovery home, clinical treatment facility, or laboratory. However, this trend to create new tools to combat corrupt payments and practices within the health care sphere existed prior to EKRA's enactment; the federal government targeted private-payor corrupt health care payment schemes with a relatively unknown sixty-year old statute, 18 U.S.C §1952 (The Travel Act).[19] This Comment will delve into the implications of the federal government utilizing the Travel Act in this new and inventive way.

II. Background Information

Although the federal government has begun to utilize the Travel Act to punish individuals engaged in illicit health care transactions, Congress originally created the Travel Act to fight against racketeering and corruption associated with organized crime.[20] In 1961, Attorney General Robert F. Kennedy proposed 18 U.S.C §1952, "Interstate and foreign travel or transportation in aid of racketeering and enterprises" to punish individuals conducting interstate operations in furtherance of unlawful acts, such as, "gambling, prostitution, violent crime, untaxed liquor distribution, extortion, and bribery."[21] The text of §1952 prohibits:

disorders and refer them to substandard or fraudulent providers in exchange for kickbacks).

[17] 18 U.S.C § 220(a)(1)-(2) (2018).

[18] Nick Oberheiden, *6 Impacts on Laboratories, Clinics, and Other Treatment Facilities*, THE NAT'L L. REV. (Dec. 10, 2020), https://www.natlawreview.com/article/6-impacts-ekra-laboratories-clinics-and-other-treatment-facilities.

[19] 18 U.S.C § 1952 (2014); Jampol, *supra* note 5.

[20] Patrick D. Souter, *The Travel Act: Sixty-Year Old "New" Tool in Healthcare Fraud Enforcement*, ABA (May 1, 2018), https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2017-2018/may2018/travelact/.

[21] Smith, *supra* note 10, at 1; 18 U.S.C § 1952.

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with the intent to—
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> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. . . .
>
> (b) As used in this section (i) "unlawful activity" means . . .
>
> (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or . . . .[22]

With the rise in health care prosecutions under the Travel Act, many health care attorneys caution those in the field to parse federal statutes more carefully, and to focus on statutes beyond the traditional healthcare-related federal statutes.[23] Irrespective of these well-intentioned warnings, health care professionals and legal practitioners have not directly questioned whether the Travel Act is a proper tool to prosecute health care fraud and abuse in the first place.[24]

The federal government's decision to prosecute health care schemes under the Travel Act has raised several concerns, which include: prosecutors moving beyond the Travel Act's original intent of prosecuting organized crime, the Act's broad language, the government's lack of interest in pursuing private-payor illegal remuneration schemes, and other potential issues. This Comment will focus on these issues to ultimately determine whether the Travel Act's extension into the health care space is proper.

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[22] 18 U.S.C. § 1952(a)–(b).

[23] *See generally*, Matthew Hogan and B. Scott McBride, *The Government's Creative Use of the Travel Act in Healthcare Fraud Prosecutions*, MORGAN LEWIS (May 22, 2019), https://www.morganlewis.com/blogs/healthlawscan/2019/05/the-governments-creative-use-of-the-travel-act-in-healthcare-fraud-prosecutions.

[24] The first noted use of the Travel Act in healthcare abuse and fraud prosecution was in 2013. *See*, DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD & ABUSE CONTROL PROGRAM: ANN. REP. FOR FISCAL YEAR 2013, 24 (Feb. 2014).

III. Analysis

A. PRELIMINARY ISSUES

1. Moving Beyond The Travel Act's Legislative Intent Into the Health Care Sphere

When Congress enacted the Travel Act, it was "the most controversial and important statute within [Attorney General Robert F.] Kennedy's organized crime package proposal," and was a smaller piece of a greater movement and legislative program directed toward dismantling organized crime.[25] Congress targeted organized crime's intricate interstate structure because state government resources were inadequate to deal with the complex and interstate nature of multiparty organized crime.[26]

i. The Travel Act's Origins

In an effort to thwart interstate organized crime, Kennedy proposed the Travel Act to enable the federal government to aid local law enforcement authorities.[27] The Act was deemed "necessary to aid local law enforcement officials in instances where 'the "top men" of a given criminal operation resided in one state but conducted their illegal activities in another.'"[28] Overall, Congress' primary motivation for enacting § 1952 was to quell organized crime.

ii. Can Prosecutors Read the Travel Act Broadly Outside its Organized Crime Context?

Due to the Travel Act's broad language, it covers a number of crimes traditionally considered outside of the organized crime

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[25] Souter, *supra* note 20 (citing *Attorney General's Program to Crush Organized Crime and Racketeering: Hearing on Legislation Involving Organized Crime before H. Comm. on the Judiciary,* 87th Cong. (1961) (Statement of Attorney General Robert F. Kennedy)); *see also* Perrin v. United States*,* 444 U.S. 37, 41 (1979) (discussing the Travel Act's legislative history).

[26] *Perrin*, 444 U.S. at 41 (citing *Legislation Relating to Organized Crime: Hearing on H.R. 468, H.R. 1246, etc., before Subcommittee No. 5 of the H. Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961); *see also* United States v. Ferber, 966 F.Supp. 90, 101 (D. Mass. 1997) (quoting United States v. Nardello, 393 U.S. 286, 291 (1969) (quoting S. Rep. No. 644, 87th Cong., 1st Sess. (1961)).

[27] United States v. Archer*,* 486 F.2d 670, 679 (2d Cir. 1973) (citing S.Rep. No.644, at 4 (1961)).

[28] *Id.* (quoting *Attorney General's Program to Crush Organized Crime and Racketeering: Hearings on S.1653-1658 before S. Judiciary Comm.* 87th Cong. 15-17 (1961) (Statement of Attorney General Robert F. Kennedy)).

context.[29] The Supreme Court defended the Travel Act's non-traditional, or off-brand use, in *Perrin v. United States*.[30] The *Perrin* Court understood the Travel Act to reflect Congress's clear and deliberate intent to alter the federal-state balance in order to enforce the Travel Act's underlying predicate state bribery statutes.[31] The Supreme Court did not differentiate between bribery statutes related to organized crime and more general bribery statutes. Rather, the Court spoke broadly about Congress's motivation to enforce violations of state law within federal statutes.[32] As such, the government may utilize the Travel Act in health care prosecutions.

In *United States v. Le Faivre,* the United States Court of Appeals for the Fourth Circuit noted that even if it was desirable or wise to limit the Travel Act to organized crime, the court lacks the authority to make that determination.[33] Courts play a judicial role, and, as such, it is inappropriate to enter the legislative sphere. Congress has the power to create and to define the Travel Act's dictates, and it decided not to limit the statute to organized crime.[34] Beyond that, courts should not prevent prosecutors from charging Travel Act violations in health care corrupt payment prosecutions.

2. The Federal Government's Interest in Pursuing Private-Payor Schemes

In 2019, the federal government spent almost 1.2 trillion dollars on health care.[35] In order to protect this enormous government expenditure, the federal government and its agencies have organized strike force teams to investigate and prosecute those who manipulate the system for their own pecuniary benefit.[36] Given the amount of money at stake and the number of health care programs the government

[29] *See generally* Souter, *supra* note 20 (discussing how the Travel Act had recently been used in health care abuse and fraud prosecutions).

[30] *Perrin*, 444 U.S. at 50.

[31] *Id.*

[32] *Id*.

[33] United States v. Le Faivre, 507 F.2d 1288, 1293-94 (4th Cir. 1974).

[34] *See* 18 U.S.C. § 1952 (2014).

[35] Tax Policy Center, *How Much Does the Federal Government Spend on Health Care?,* https://www.taxpolicycenter.org/briefing-book/how-much-does-federal-government-spend-health-care (last visited Mar. 25, 2021) ("Of that, Medicare claimed roughly $644 billion, Medicaid and the Children's Health Insurance Pro-gram (CHIP) about $427 billion, and veterans' medical care about $80 billion.").

[36] *See* DEP'T. OF JUSTICE, STRIKE FORCE OPERATIONS (2020), https://www.justice.gov/criminal-fraud/strike-force-operations (last visited Apr. 5, 2021).

administers,[37] the federal government's interest is obvious in regards to government-payor programs. However, some legal commentators have recognized the aggressive position the Department of Justice is taking in punishing schemes involving *private-payor* items and services.[38] Accordingly, this raises issues regarding the appropriateness of the federal government's interest in fraudulent private-payor schemes.

i. The Government's Interest in Corrupt Payments and Fraud and Abuse Schemes involving Private-Payor Health Care Programs

Unlike the federal Anti-Kickback Statute (AKS) which only targets corrupt payments associated with government-payor programs, the Travel Act does not require a connection between the illegal remuneration and a federal health care program. Rather, the Travel Act criminalizes unlawful activities more broadly, such as corrupt payments.[39] The Act punishes those who travel in interstate commerce or use the mail or facilities in interstate commerce with the intent to engage in unlawful activity.[40]

However, the federal government's interest in recovering money from illicit health care schemes also extends to the private-payor context. An argument implying the government should not involve itself in the private-payor context because it does not pay the bill fails to recognize the health care system's important, life-sustaining nature. In addition, the federal government seeks to punish nefarious health care providers, as it does with any other criminal actor.[41] Prosecutors should be able to pursue these providers regardless of whether their illegal activities involve a private-payor or a government-payor because illicit action and corruption in health care is a major threat to the system as a whole.[42] It should not matter who pays the bill.

Moreover, the Travel Act is neither the first, nor the only example of the federal government voicing its interest in preventing and investigating health care fraud and abuse involving private-payors. In September 2012, the U.S. Department of Health and Human Services

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[37] *See* INST. OF MED., *supra* note 7, at 3.

[38] *See* Johnathan N. Halpern & Ilenna J. Stein*, Hospitals, Doctors (and Others) Beware: DOJ May Apply Travel Act to Healthcare Prosecutions,* HOLLAND & KNIGHT (Apr. 25, 2019), https://www.hklaw.com/en/insights/publications/2019/04/hospitals-doctors-and-others-beware-doj-may-apply-travel-act.

[39] *See* 18 U.S.C. § 1952.

[40] *Id*.

[41] *See generally* Dep't. of Justice, *supra* note 1.

[42] *See* U.S. DEP'T. OF HEALTH AND HUMAN SERVICES & DEP'T. OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2018 10 (May 2019).

(HHS) Secretary and the U.S. Attorney General signed the Health Care Fraud Prevention Partnership (HFPP) Charter, which established a data sharing project between the public sector and private health care insurance industry.[43] The HFPP Charter strives to improve detection and prevention of health care fraud through a private-public sector data exchange, and to provide a forum for private and public leaders to share practices and methods to detect and prevent health care fraud.[44] This coordinated effort highlights the government's interest in stopping unlawful activities within private-payor programs and the importance of pursuing and punishing health care fraud and abuse within the private health insurance realm.

ii. Increased Federal Resources Expended in Travel Act Cases

Although the federal government does have an interest in prosecuting corrupt payment schemes involving private-payor insurance, is the increased expenditure of federal resources to assist in state enforcement efforts justified?

In *Perrin v. United States,* the Court reflected upon the Travel Act's history, and recognized Congress's desire to reference existing state law in defining the Travel Act.[45] Congress intended to add a second layer of enforcement because state enforcement officials' efforts were often unsuccessful.[46] State governments simply lacked the necessary means to pursue organized crime leaders who lived in one state but carried out their illicit activities in different states.[47]

Just as state and local governments needed the Travel Act to target organized crime with federal resources, the federal government may supplement the states' resources to address illegal conduct within the health care sphere. Section 1952 helps federal agencies, such as the DOJ,

[43] *About the Partnership*, THE HEALTHCARE FRAUD PREVENTION PARTNERSHIP, https://hfpp.cms.gov/about/background.html (last visited Mar. 19, 2021). Currently, HFPP's members include five federal partners, including the U.S. Department of Defense, U.S. Department of Health and Human Services, and U.S. Department of Labor, as well as ninety-two private insurance carriers. *Current Partners*, THE HEALTHCARE FRAUD PREVENTION PARTNERSHIP, https://www.cms.gov/hfpp/about/current-partners (last visited Mar. 19, 2021).

[44] *About the Partnership*, HEALTHCARE FRAUD PREVENTION PARTNERSHIP, https://hfpp.cms.gov/about.html (last visited Mar. 19, 2021).

[45] Perrin v. United States, 444 U.S. 37, 41-42 (1979).

[46] *Id*. at 42.

[47] *See generally* United States v. Archer, 486 F.2d 670, 679 (2nd Cir. 1973) (citing *Attorney General's Program to Crush Organized Crime and Racketeering: Hearing before Sen. Judiciary Comm.* 87 Cong. 15-17 (1961) (Statement of Attorney General Robert F. Kennedy)).

pursue their interests in prioritizing health care fraud and abuse, even if it is a departure from the government's ordinary charging theories. And, the DOJ is not the sole agency interested in prosecuting health care bribes and kickback schemes—the DOJ also coordinates with state, federal, private and public partners to ameliorate this issue because "healthcare fraud affects everyone."[48] In the end, the health care system's public importance allows the federal government to employ vast amounts of resources to ferret out kickbacks in the private-payor context.[49]

B. TRAVEL ACT ISSUES IN PRACTICE: CASE STUDIES

Recent developments in New Jersey, Texas, and Florida illustrate the rise of the Travel Act as a powerful tool in health care prosecutions. These cases, involving millions of dollars and numerous defendants, indicate that courts recognize the Travel Act as a viable instrument to punish individuals engaged in corrupt payment practices in the health care system.

1. The Biodiagnostic Laboratory Services Scheme

Beginning in March 2006 and lasting until approximately April 2013, Biodiagnostic Laboratory Services (BLS), a New Jersey-based lab, routinely paid physicians bribes to induce them to refer their blood samples from Medicare and private-payor beneficiaries to BLS for testing.[50] These actions resulted in convictions of fifty-three defendants, including thirty-eight doctors, namely Dr. Greenspan and Dr. Ostrager.[51]

i. United States v. Greenspan

Dr. Greenspan, one of the doctors charged, accepted bribes from BLS in exchange for referring out his patients' blood tests to BLS.[52] He was convicted under the Travel Act and the federal Anti-Kickback

[48] Denise O. Simpson, *Health Care Programs and Fighting Healthcare Fraud in United States of America*, 64 U.S. ATTORNEYS' BULLETIN 1, 5-6 (2016).

[49] Smith, *supra* note 10 at 2.

[50] Indictment at 4, United States v. Greenspan, No. 2:16-cr-00114-WHW (D.N.J. Mar. 8, 2016).

[51] Although there are fifty-three defendants convicted in the BLS scheme, this Comment will focus on defendants Greenspan and Ostrager, as they were indicted and filed motions challenging the use of the Travel Act. *See* Press Release, Dep't. of Justice, President of New Jersey Clinical Laboratory and His Brother, A Senior Employee, Sentenced to Provision in $100m+ Test Referral/Bribery Scheme (June 13, 2018), https://www.justice.gov/usao-nj/pr/president-new-jersey-clinical-laboratory-and-his-brother-senior-employee-sentenced-prison.

[52] United States v. Greenspan, 2016 U.S. Dist. LEXIS 108856, at *45 (D.N.J. Aug. 16, 2016).

Statute (AKS) for accepting bribes within a long-running BLS scheme.[53] Over the course of the scheme, Greenspan received $200,000 in bribes from BLS "in the form of sham rental checks, service agreement[s], and consultant payments."[54] Dr. Greenspan was indicted under both the AKS and the Travel Act due to the scheme involving both government and private insurance beneficiaries.[55] For the referrals of the Medicare patients' blood specimens to BLS for testing, Dr. Greenspan was charged with violations of the federal Anti-Kickback Statute.[56] For the portion of the scheme that involved referring privately insured patients' blood samples to BLS, Dr. Greenspan was charged under the Travel Act.[57]

ii. United States v. Ostrager

Another defendant involved in the BLS scheme was Dr. Bret Ostrager, a doctor from Nassau County, New York.[58] From 2011 to 2013, Ostrager accepted monthly cash bribes of approximately $3,300 per month and other valuable items as bribes for referring his Medicare and privately insured patients to BLS.[59] The referrals that Ostrager generated enabled BLS to collect approximately $909,000 from Medicare and private insurers.[60] Because the illicit payments that Ostrager received within the BLS scheme involved both government-payor beneficiaries and private-payor patients, federal prosecutors charged Ostrager with violations of both the Anti-Kickback Statute and the Travel Act.[61]

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53 Press Release, Dep't. of Justice, Bergen County Doctor Convicted of Taking Bribes in Test-Referral Scheme with New Jersey Clinical Lab (Mar. 6, 2017), https://www.justice.gov/usao-nj/pr/bergen-county-doctor-convicted-taking-bribes-test-referral-scheme-new-jersey-clinical-lab (announcing that Greenspan was convicted of one count of conspiring to commit violations of the Anti-Kickback Statute, the Federal Travel Act and wire fraud, three substantive violations of the Anti-Kickback Statute, three substantive violations of the federal Travel Act, and three substantive violations of wire fraud).

54 Dep't. of Justice, *supra* note 53.

55 Defendant was also indicted on Honest Services Fraud, which is outside the scope of this Comment; *See* Indictment, *supra* note 50.

56 Indictment, *supra* note 50, at 16.

57 *Id*. at 18.

58 Indictment at 4, United States v. Ostrager, No. 2:15-cr-00399-SRC (D.N.J. Aug. 12, 2015).

59 *Id*. at 4-5, 7.

60 *Id.* at 5; *see also* Press Release, Dep't. of Justice, New York Doctor Sentenced to 37 Months in Prison For Taking Bribes in Test-Referral Scheme with New Jersey Clinical Lab (June 8, 2016), https://www.justice.gov/usao-nj/pr/new-york-doctor-sentenced-37-months-prison-taking-bribes-test-referral-scheme-new-jersey.

61 Indictment, *supra* note 58, at 11-14.

2. The Forest Park Medical Center Scheme

The federal government has also prosecuted defendants who opted out of government-payor programs entirely to avoid punishment. In 2016, federal prosecutors charged twenty-one defendants, including physicians, advertising executives, health care executives, and one attorney, with Travel Act violations in the Northern District of Texas case, *United States v. Beauchamp*.[62] *Beauchamp* involved a kickback scheme where Forest Park Medical Center (FPMC), a physician-owned hospital, paid more than $40 million in bribes and kickbacks to induce physicians to use the hospital.[63] The DOJ asserted that the FPMC conspiracy consisted of three prongs: (1) maximizing FPMC's patient's insurance reimbursement by refusing to join certain low-reimbursing insurance plan networks; (2) maximizing patient referrals by paying kickbacks to physicians; and (3) disguising the scheme as a legitimate transaction through sham business ventures.[64] The scheme centered on defendants choosing only to treat those with high-reimbursing commercial insurance plans at FPMC, and transferring lower-reimbursing, mostly government-payor, beneficiaries in exchange for cash.[65] Most of the kickbacks in the FPMC scheme were disguised as consulting or marketing fees, but were actually corrupt payments distributed to doctors based on the percentage of surgeries each doctor referred to FPMC.[66] FPMC's hospital manager, Alan Beauchamp, testified that FPMC "bought surgeries" from doctors, and then Beauchamp "papered it up to make it look good."[67] Legal commentators have suggested that the prosecutors' use of the Travel Act in the FPMC case serves as a reminder that health care providers who do not accept

[62] Jonathan S. Feld, Monica B. Wilkinson, Lea F. Courington, & Alison L. Carruthers, *The Rise of the Travel Act*, L. J. NEWSLETTERS (Oct. 2017).

[63] Press Release, U.S. Dep't. of Justice, Seven Guilty in Forest Park Healthcare Fraud Trial (Apr. 10, 2019), https://www.justice.gov/usao-ndtx/pr/seven-guilty-forest-park-healthcare-fraud-trial; Brett Barnett & Nesko Radovic, *DOJ's Travel Act Prosecution Yields Convictions for Kickbacks Involving Private Payors*, MCGUIRE WOODS LLP (May 28, 2019), https://www.jdsupra.com/legalnews/doj-s-travel-act-prosecution-yields-78519/ (last visited Apr. 5, 2021).

[64] David J. Edquist et al., *Forest Park Medical Center and the Travel Act: Different Road, Same Destination*, NAT'L L. REV., (Apr. 23, 2019), https://www.natlawreview.com/article/forest-park-medical-center-and-travel-act-different-road-same-destination.

[65] Feld, *supra* note 62 (citing Indictment, United States v. Beauchamp, No. 3-16cr-0516D (N.D. Tex. Nov. 16, 2016)).

[66] U.S. Dep't. of Justice, *supra* note 63

[67] U.S. Dep't. of Justice, *supra* note 63

Medicare or Medicaid beneficiaries and engage in sham arrangements to disguise physician referrals are still at risk of federal prosecution.[68]

In the FPMC scheme, the Travel Act proved useful in prosecuting parts of the scheme that did not violate the federal Anti-Kickback Statute; prosecutors were only able to charge violations of the federal Anti-Kickback Statute against those who "knowingly" received or solicited illegal renumerations in connection with government-payor beneficiaries.[69] Out of the twenty-one defendants, seven were found guilty of violating the federal Anti-Kickback Statute, ten pled guilty before trial, and two of the defendants were found guilty of Travel Act violations.[70] Without the Travel Act, certain actors in this gross abuse of the health care system – amounting to 40 million dollars in illicit payments – would have gone unpunished.

3. The Delray Beach Patient Brokering Scheme

In *United States v. Snyder*, defendant Eric Snyder established a substance abuse treatment center for individuals suffering from drug and alcohol addiction.[71] In order to bring residents to the center, the defendant provided kickbacks and bribes in the form of "free or reduced rent, payment for travel, and other benefits."[72] Defendants further paid "patient brokers" kickbacks for referring clients to the treatment center.[73] On top of these bribes and kickbacks, Snyder paid doctors to order expensive urine drug screenings so that private insurance providers would reimburse Snyder for the tests.[74] Unlike the cases mentioned above, there was no federal-payor program involved in *Synder*, so the indictment could not, and did not, contain any federal Anti-Kickback Statute charges, but did include Travel Act charges.[75] As

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[68] Edqusit et al., *supra* note 64.

[69] Feld, *supra* note 62.

[70] *Healthcare Fraud Update: The Forest Park Medical Center Case and Federal Enforcement of Private Insurance Referrals*, SBEMP ATTORNEYS, https://sbemp.com/healthcare-fraud-update-the-forest-park-medical-center-case-and-federal-enforcement-of-private-insurance-referrals/ (last visited Apr. 5, 2021).

[71] Indictment at 14, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. Jun. 7, 2018).

[72] *Id.*

[73] *Id.* at 14; *Id.* at 20; "Patient brokering" or "body brokering" refers to the unscrupulous doctors in the opioid and drug treatment business who refer patients to a facility in return for a generous kickback; *See* Partnership to End Addiction, *What to Look For — and what to Avoid – When Searching For an Addiction Treatment Program*, https://drugfree.org/article/what-to-look-for-and-what-to-avoid-when-looking-for-an-addiction-treatment-program/ (last visited Apr. 5, 2021).

[74] *Id.* at 16-20.

[75] *Id*. at 19.

in the BLS and FPMC schemes, *Snyder* provides another illustration for why prosecutors need the Travel Act—to pursue individuals engaged in illicit remuneration schemes that cannot be charged under traditional health care corrupt payment statutes.[76]

C. THE TRAVEL ACT IN THE HEALTH CARE REALM

In light of the Travel Act's original purpose and legislative history, some may feel uncomfortable with applying this statute to health care prosecutions, such as those mentioned in the above case studies. After all, the Travel Act is aptly named "Interstate and foreign travel or transportation in aid of racketing and enterprises."[77] But, a statute's title is not dispositive nor is it part of the statutory text.[78] A title may be persuasive, but it is not a substitute for the detailed provisions of the text.[79] In fact, the Second and Sixth Circuits have recognized that it would be "beyond the proper exercise of judicial powers for courts to confine the Travel Act to its title."[80] If the legislators meant for the statute to apply strictly to organized crime, drafters should have added limiting language.

The Travel Act was originally intended to impede the travel of persons engaged in illegal business or other unlawful activity and target actors who lived in one state and operated illicit operations elsewhere.[81] As such, the statutory intent is consistent with federal prosecutors' new method to charge Travel Act violations where health care providers live and work in one state and engage in illicit activities in another state.[82]

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[76] The Travel Act was an especially necessary prosecutorial tool because *Snyder* was charged in June 2018 prior to EKRA's October 2018 enactment, which addressed corrupt patient-brokering practices. *See* Indictment, *supra* note 71; *See* 18 U.S.C. §220.

[77] 18 U.S.C. § 1952 (2014).

[78] *See*, Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, CONGRESSIONAL RESEARCH SERVICE 1, 35-36 (2014).

[79] *Id.*

[80] United States v. Archer, 486 F.2d 670, 680 (2d Cir. 1973) (citing Fraser v. United States, 145 F.2d 139, 142 (6th Cir. 1944)).

[81] Rewis v. United States, 401 U.S. 808, 811 (1971) (citing S. Rep. No. 644, at 2-3 (1961)).

[82] *E.g.,* Def's Memorandum of Law to Dismiss Charges and Other Relief, United States v. Ostrager, Crim. No. 15-399 (D.N.J. Sept. 25, 2015) (charging a New York doctor with a Travel Act violation when he sent his New York patient's blood panels to a New Jersey lab).

1. The Travel Act as the Federal Government's Gap Filler

The Travel Act is an important prosecutorial tool that allows the federal government to reach health care providers who refuse to accept Medicare and Medicaid patients and benefits in an attempt to circumvent AKS sanctions.[83] The federal government and its agencies have a keen interest in prosecuting private-payor health care fraud due to the troubling trend of health care providers not enrolling in Medicare or Medicaid, and/or referring Medicare or Medicaid patients to other providers in exchange for cash or other compensation. [84] Unlike the federal Anti-Kickback Statute, the Travel Act's breadth allows federal prosecutors to pursue health care fraud and abuse cases outside the government-payor system. But, this leaves open the question: is the Travel Act too broad for health care prosecutions?

From a textual perspective, the Travel Act's "broadness" is derived from its definition of "unlawful activity."[85] "Unlawful activity" encompasses "extortion, bribery, or arson in violation of the laws of the State in which committed …"[86] Such an interpretation allows for state commercial bribery laws to serve as a predicate for Travel Act violations, and substantially impacts the health care sphere.[87] The statute's language is broad on its face, which clearly allows prosecutors to pursue health care schemes that involve a violation or an intent to violate a state commercial bribery statute in connection with an interstate facility.[88]

The Travel Act's rise in popularity is credited not only to its breadth and significance as a powerful prosecutorial tool, but also as a result of the noticeable gaps in the federal Anti-Kickback Statute. The Travel Act allows prosecutors to bypass the government-payor requirement and extends federal jurisdiction over private-payor illegal kickback schemes. Rather than criticizing this increase in federal power, the rise of the Travel Act should serve as a reminder to health care providers,

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83 *E.g.,* Indictment, United States v. Beauchamp, No. 3-16cr-0516D (N.D. Tex. Nov. 16, 2016) (charging Travel Act violations when defendant refused to accept government healthcare program beneficiaries).

84 *See* Smith, *supra* note 10 at 5; *see also* Dep't. of Health and Human Services, Office of Inspector General, Advisory Opinion No. 13-03 (June 7, 2013) (stating that the OIG explicitly denounces agreements where healthcare professionals have either refused to accept or "carved out" federal payor recipients from otherwise "questionable financial agreements.").

85 *See* 18 U.S.C. § 1952(b) (2014).

86 18 U.S.C. § 1952(b)(2).

87 *See* Barnett, *supra* note 63.

88 *See generally*, Indictment, supra note 50, at 6; Indictment, *supra* note 83, at 33.

"that patients – not payments – should guide decisions about how and where doctors administer treatment."[89] In essence, federal prosecutors regard the Travel Act as an appropriate way to eliminate AKS's legal loophole.[90] However, the Travel Act is not a font of unlimited power. Like the AKS, the government does not have a free pass to prosecute any suspicious health care arrangement involving private health insurance.

2. State Commercial Bribery Statutes as Limits on the Travel Act in Health Care Prosecutions

As previously stated, § 1952 prohibits travel in interstate commerce with the intent to commit an "unlawful activity."[91] In the health care prosecution context, "unlawful activity" is typically defined under a state commercial bribery statute, but not all states have a commercial bribery statute.[92] Currently, ten states do not have a commercial bribery statute or a related statute that satisfies § 1952's "unlawful activity" element.[93] That begs the question—are Travel Act prosecutions truly fair if the charges depend on whether an individual is in a state with a commercial bribery statute? And beyond that, does the fact that each state has substantively different commercial bribery statutes still lead to potentially unequal prosecutions?

The Texas Commercial Bribery Statute (TCBS) served as the state law predicate in the Forest Park Medical Center scheme.[94] Prosecutors charged individuals, including Dr. Beauchamp, under the Travel Act because they used interstate facilities, namely interstate banking systems and emails, with the intent to violate the TCBS.[95] The TCBS makes it unlawful for a fiduciary, without the consent of the beneficiary, to "intentionally or knowingly solicit[], accept[], or agree[] to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary."[96] As such, state commercial bribery statutes,

89 U.S. DEP'T. OF JUSTICE, *supra* note 63.

90 Smith, *supra* note 10, at 2.

91 18 U.S.C. § 1952.

92 Smith, *supra* note 10, at 3.

93 Smith, *supra* note 10, at 3. The ten states that do not have a state commercial bribery statute are: Georgia, Idaho, Indiana, Maryland, Montana, New Mexico, Oregon, Tennessee, West Virginia and Wyoming. Interestingly enough, one state, California, has multiple state commercial bribery statutes.

94 Indictment, *supra* note 83, at 33-34.

95 *Id*.

96 TEX. PENAL CODE ANN. § 32.43 (West 2019).

such as TCBS, cabin possible Travel Act violations to those who have a fiduciary duty to their beneficiaries.[97]

Similar to Texas, New Jersey also has a commercial bribery statute. N.J.S.A. § 2C:21-10 states a "person commits a crime if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as … a . . . physician."[98] In *U.S. v. Greenspan*, the defendant accepted bribes from Biodiagnostic Laboratory Services (BLS) in exchange for referring out his patients' blood tests to BLS.[99] By accepting this consideration, Dr. Greenspan broke his fiduciary duty because New Jersey physician regulations expressly prohibit physicians from accepting bribes.[100]

Although *Greenspan* is a relatively simple application of the Travel Act, the decision does not address the question of whether a doctor from one state has a fiduciary duty under another state's commercial bribery statute.[101] The United States District Court for the District of New Jersey in *Ostrager* answered this question in the affirmative, and denied the defendant-physician's motion to dismiss a Travel Act violation.[102] As previously mentioned, *Ostrager* arose out of the larger Biodiagnostic Laboratory Services (BLS) scheme. In *Ostrager*, the defendant argued he did not owe the fiduciary duty required under the New Jersey State Commercial Bribery Statute because he is a New York doctor with no New Jersey ties.[103] But, the court held that the government's allegation of express *quid pro quo* conduct, i.e. the payment in exchange for sending the patient to a particular facility, was enough to deny the defendant's motion to dismiss.[104] The court understood this case to involve a New York doctor who made the conscious decision to send his patient's blood panels to a New Jersey lab, BLS, in return for compensation, and accepted compensation through a New Jersey-based bank.[105] These actions were enough to meet the "bribery … in violation of the laws of the State in which committed" element under § 1952.[106]

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97 Under § 32.43(a)(2)(C), physicians are named as a fiduciary.

98 N.J. STAT. ANN. § 2C:21-10 (1979).

99 United States v. Greenspan, No. 16-114 (WHW), 2016 U.S. Dist. LEXIS 108856, at *48 (D.N.J. Aug. 16, 2016).

100 *Id*.

101 *Id.* at *2-3.

102 Transcript of Oral Argument Part B at 14-15, United States v. Ostrager, Crim. No. 15-399 (D.N.J. Sept. 25, 2015).

103 Def's Memorandum of Law to Dismiss Charges and Other Relief at 4, United States v. Ostrager, Crim. No. 15-399 (D.N.J. Sept. 25, 2015).

104 Transcript of Oral Argument Part B at 18-19, United States v. Ostrager, Crim. No. 15-399 (D.N.J. Sept. 25, 2015).

105 *Id*. at 12, 19-20.

106 *See* 18 U.S.C. § 1952 (2014).

In short, Ostrager broke his fiduciary duty under N.J.S.A. § 2C:21-10 when he engaged in self-dealing and used his position and connections in New Jersey to further his personal interest, rather than acting in his patients' best interest.[107] The court held Ostrager should have been on notice that the New Jersey Commercial Bribery Statute would govern his conduct due to his exchange with a New Jersey lab.[108] Ostrager's self-interested interaction with the lab allowed a jurisdictional basis for New Jersey district courts and, consequently, the federal government under § 1952, to impose sanctions on Ostrager.[109]

The Texas and New Jersey District Courts found the state law predicate violation and interstate nexus sufficient for the Travel Act, but *United States v. Snyder* illustrates what occurs when prosecutors charge an insufficient state law predicate. In *Snyder*, the alleged interstate nexus was the purchase of plane tickets to bring the clients to the substance abuse treatment center.[110] However, the defendant moved to have the Travel Act count dismissed, arguing the Florida Patient Brokering Statute (Fla. Stat. § 817.505) was not a proper state law predicate and did not govern his actions.[111] Section 817.505 prohibits health care facilities from offering kickbacks to induce patient referrals to a health care facility.[112] Snyder argued that the Florida Patient Brokering Statute was not an appropriate state law predicate for the Travel Act, as § 1952 does not include "kickbacks" as an "unlawful activity."[113] Rather, the Travel Act defines "unlawful activity" as "extortion, bribery, or arson in violation of the laws of the State in which committed."[114] The defendant criticized the government's attempt to expand the Travel Act's definition of "unlawful activity" to include "kickbacks," and sought to stop the government from claiming that "bribery" and "kickbacks" are synonymous.[115]

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[107] Transcript of Oral Argument Part B at 26, United States v. Ostrager, Crim. No. 15-399 (D.N.J. Sept. 25, 2015).

[108] *Id*. at 38.

[109] *Id.* at 20.

[110] Indictment, *supra* note 71, at 20.

[111] Reply to Gov't Consolidated Response to Snyder's Mot. to Dismiss Travel Act Counts at 1-2, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. July 1, 2019).

[112] FLA. STAT. ANN. § 817.505 (2020).

[113] Reply to Gov't Consolidated Response to Snyder's Mot. to Dismiss Travel Act Counts at 2, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. July 1, 2019).

[114] 18 U.S.C. § 1952 (2014).

[115] Reply to Gov't Consolidated Response to Snyder's Mot. to Dismiss Travel Act Counts at 2, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. July 1, 2019).

Snyder illustrates the Travel Act's limits. Although the case ended in a plea agreement, the government ultimately dismissed the Travel Act charge.[116] There is a good reason to believe the Travel Act violation would not have withstood judicial scrutiny because the Florida Patient Brokering Statute is not a state law governing "unlawful activity." Patient brokering kickbacks do not meet the Travel Act's statutory definition of "unlawful activity," even if kickbacks are considered unlawful in other legal contexts.

In *Snyder,* the proper state law predicate may have been the Florida Commercial Bribery Statute. However, the statute did not apply to Snyder's situation.[117] The Florida Commercial Bribery Statute requires a "public servant" to be engaged in the alleged misconduct, and Snyder, as a substance abuse treatment center owner, is clearly not a public servant.[118] Although it is somewhat speculative, the outcome in *Snyder* illustrates that the Travel Act is not an infinite source of power in health care prosecutions. The Travel Act has limits—namely that a proper state law predicate must be charged.

D. CONSTITUTIONAL ISSUES

Due to the Travel Act's heavy reliance on state law and the great deal of overlap with other federal statutes, a proper inquiry into the questions of federalism, preemption, and double jeopardy must be evaluated. One prominent lingering question that arises after evaluating *Greenspan, Beauchamp*, and *Snyder* is whether federal prosecutors should be able to use state laws to confer federal jurisdiction over a case?

1. Federal Auxiliary Criminal Jurisdiction and Federalism Concerns

Because the Travel Act's language includes a state law predicate to confer federal jurisdiction, there is the unanswered question as to whether the Travel Act takes federal criminal law beyond its reasonable bounds and disrupts the delicate federalism balance. Even outside the

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116 Plea Agreement at 1, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. July 23, 2019).

117 There is the possibility that the federal prosecutors charged Snyder with violations of the Patient Brokering Statute because the prosecutors may not have had the same intimate familiarity with state commercial bribery statutes as they do with federal statutes.

118 Reply to Gov't Consolidated Response to Snyder's Mot. to Dismiss Travel Act Counts at 2, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. July 1, 2019); Complaint at 2, United States v. Snyder, No. 18-cr-80111-ROSENBERG (S.D. Fla. July 11, 2017).

Travel Act context, there is widespread concern that "federal auxiliary criminal jurisdiction" has become so prevalent that all local offenses become federal crimes if some distinctive federal involvement or attribute is present.[119] Section 1952's interstate element, however, dismisses federalism-based concerns, and makes federal jurisdiction and the use of federal resources appropriate. After all, the government is simply using its constitutional power "to prohibit activities of traditional state and local concern that also have an interstate nexus."[120]

In *United States v. Goldfarb*, the court held "[t]he overriding federal nature of the Travel Act dictates that an offense thereunder is primarily federal in nature[,]" and "[t]he gravamen of the offense is the interstate nexus," not the state commercial bribery statute.[121] Although the defendant in *Goldfarb* claimed there was no Travel Act violation because the state law (absent the Travel Act charge) violated his constitutional rights, the court rejected this argument because a state law's constitutionality does not bear on the Travel Act violation.[122] Rather, the state law serves as a predicate for a Travel Act violation, and "there is no need to prove a violation of state law as an essential element of federal crime."[123] *Goldfarb* gives credence to the proposition that the Travel Act is a federal offense wholly separate from the underlying state law predicate, which allows the government to confer federal jurisdiction and resources.

Similarly, the Northern Texas District Court concluded the Travel Act does not violate federalism principles because a commercial bribery statute violation (or intent to violate) coupled with an interstate nexus is a valid federal concern.[124] As such, the court did not dismiss the defendant's Travel Act charge and rejected the defendant's

119 *See* United States v. Archer, 486 F.2d 670, 678 (2d Cir. 1973) (citing N. Abrams, *Consultant's Report on Jurisdiction*, 1 *Working Papers of the National Commission on Reform of Federal Criminal Laws*, 33, 36 (1970)). Abrams' work discusses the possibility that the federal government can now involve itself in all types of substantive criminal prosecution so long as there is some distinctive federal involvement, such as interstate commerce, travel, or facilities. *See* N. Abrams *Consultant's Report on Jurisdiction*, 1 *Working Papers of the National Commission on Reform of Federal Criminal Laws* 36-37 (1970). His work also proposes the idea that the Travel Act is the logical limit of this idea. *Id.*

120 Perrin v. United States, 444 U.S. 37, 42 (1979). The validity of Congress' power under the Commerce Clause of the Federal Constitution is outside this Comment's scope.

121 United States v. Goldfarb, 464 F. Supp. 565, 574 (E.D. Mich. 1979).

122 *Id.*

123 *Id.* (citing United States v. Prince, 515 F.2d 564, 566 (5th Cir. 1975); United States v. Nardello 393 U.S. 286, 292 (1959); United States v. Conway, 507 F.2d 1047, 1051 (5th Cir. 1975)).

124 United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *45 (N.D. Tex., Sept. 20, 2017).

argument that the Travel Act unconstitutionally altered the federal-state balance and ran afoul of federalism principles.[125]

i. Is the Travel Act's Interstate Nexus Too Tenuous to Confer Federal Jurisdiction?

Concerns involving the Travel Act's interstate nexus are nothing new. In 1971, the Supreme Court questioned and addressed the widespread implications of an aggressive use of the Travel Act in *Rewis v. United States*.[126] The *Rewis* Court reasoned that § 1952's legislative history discusses punishing organized crime syndicates, but the legislative record is silent beyond that.[127] The Court interpreted that silence as intentional, and concluded that if the Travel Act was to apply to "criminal activity solely because that activity is at times patronized by persons from another State," then Congress would have addressed that possibility.[128] Moreover, the Court reasoned Congress would have certainly recognized that an expansive Travel Act potentially "could alter sensitive federal-state relationships, could overextend limited federal police resources, and might produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies."[129]

However, this criticism is not applicable to utilizing the Travel Act for health care prosecutions. The issue in *Rewis* centered on defendants charged with violating the Travel Act because of "a matter of happenstance."[130] It just so happened that actors who wanted to participate in the defendant's illegal Florida lottery traveled over the nearby Florida-Georgia line.[131] In contrast, in health care corrupt payment cases, the interstate travel or use of interstate facilities is not "a matter of happenstance," rather health care professionals make the conscious decision to use interstate facilities to further their unlawful actions in violation of state commercial bribery statutes.[132]

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125 *Id.*

126 *See* Rewis v. United States, 401 U.S. 808 (1971).

127 *Id.* at 811-12.

128 *Id.* Notably, in *United States v. Archer*, the court said if the Travel Act's language was read literally the act would cover "a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman." United States v. Archer, 486 F.2d 670, 679 (2d Cir. 1973).

129 *Rewis*, 401 U.S. at 812.

130 *See id.*

131 *Id.* at 810.

132 *See generally* United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *14-15 (N.D. Tex., Sept. 20, 2017).

ii. Interstate Nexus in *Greenspan* and *Beauchamp*:

In *Greenspan*, a New Jersey District Court judge held an indictment correctly alleged a Travel Act violation and denied defendant's motion to dismiss, accordingly.[133] The indictment charged defendant-physician with violating the Travel Act because he traveled in interstate commerce and used the mail and facilities of interstate commerce in furtherance of acts of commercial bribery that violated the New Jersey Bribery statute, N.J.S.A. § 2C:21-10.[134] The court denied Greenspan's motion to dismiss because he violated the Travel Act when he received compensation via an interstate bank wire for blood tests after he received a consulting agreement check, a text message in connection with payment for defendant's holiday party, and a text message in connection with the delivery of a "consulting agreement" payment.[135] The defendant's travel in interstate commerce with the intent to distribute the proceeds of any "unlawful activity," as defined by the New Jersey Commercial Bribery statute, was enough to charge a Travel Act violation and to withstand judicial scrutiny on a motion to dismiss.[136]

Similarly, in *Beauchamp*, prosecutors correctly utilized the Texas Commercial Bribery Statute predicate to satisfy § 1952.[137] The Texas Commercial Bribery Statute makes it unlawful for a fiduciary "without the consent of his beneficiary, [to] intentionally or knowingly solicit[], accept[], or agree[] to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary."[138] Forest Park Medical Center allegedly paid money to physicians in exchange for patient referrals, which violated the Texas Commercial Bribery Statute.[139] And because the bribe was paid through an interstate banking system, the government could properly allege a Travel Act

133 United States v. Greenspan, No. 16-114 (WHW), 2016 U.S. Dist. LEXIS 108856, at *51-52 (D.N.J. Aug. 16, 2016).

134 *Id.* at *44; N.J. STAT. ANN. § 2C:21-10 (1986) ("A person commits a crime if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as … [a] . . . physician").

135 *Greenspan*, 2016 U.S. Dist. LEXIS 108856, at *14, *63.

136 *Id.* at *42, *44, *51.

137 Indictment, *supra* note 83, at 32-33; *See* Press Release, Dep't. of Justice, 14 Defendants Sentenced to 74+ Years in Forest Park Healthcare Fraud (Mar. 19, 2021), https://www.justice.gov/usao-ndtx/pr/14-defendants-sentenced-74-years-forest-park-healthcare-fraud.

138 TEX. PENAL CODE ANN. § 32.43(b) (West 2019). Section 32.43(a) lists various professions, such as physicians, as fiduciaries.

139 *See* Indictment, *supra* note 83, at 33-36.

violation.[140] In these corrupt payment Travel Act cases, the interstate nexus was not too attenuated, as the interstate facilities used in both *Greenspan* and *Beauchamp* were integral to the completion of their respective schemes.[141] Because the use of interstate facilities in these cases is neither "a matter of happenstance" nor coincidence, the Travel Act reliance on interstate facilities for the interstate nexus to confer federal jurisdiction is justified.

2. Preemption Concerns

A Travel Act violation depends heavily on its state commercial bribery statute predicate. But there may be a conflict between the federal Anti-Kickback Statute and the state commercial bribery statute, which may result in the state law being preempted.[142] Therefore, if the state commercial bribery statute is preempted by the AKS, then a Travel Act violation must be dismissed, as it fails to state the required state law predicate. AKS can preempt a state commercial bribery statute in three possible ways: (1) express preemption; (2) field preemption; or (3) conflict preemption.[143] Express preemption occurs when Congress has pre-empted state authority "by so stating in explicit terms."[144] However, there is no federal preemption provision in AKS. Therefore, conduct that is lawful under AKS may still be illegal under state law.[145] Field preemption occurs where the "scheme of federal regulation [is] . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[146] The AKS does not preempt state commercial bribery statutes because each statute regulates different conduct and people, thus the state and federal statute do not occupy the same field.[147] Nothing in the AKS indicates that Congress intended to make the statute the sole means of prosecuting health care

140 Indictment, *supra* note 83, at 33-36.

141 *See* Indictment, *supra* note 83, at 33-36; *See also* United States v. Greenspan, No. 16-114 (WHW), 2016 U.S. Dist. LEXIS 108856 at 42-51.

142 *See* United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *9-12 (N.D. Tex., Sept. 20, 2017) (holding the federal law under the AKS does not preempt the Texas Commercial Bribery Statute).

143 Pac. Gas & Elec. Co v. State Energy Res. Conservation & Dev. Comm'n, 416 U.S. 190, 203-04 (1983).

144 *Id.* at 203.

145 United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *10 (N.D. Tex., Sept. 20, 2017).

146 Pac. Gas & Elec. Co v. State Energy Res. Conservation & Dev. Comm'n, 416 U.S. 190, 204 (1983).

147 United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *11(N.D. Tex., Sept. 20, 2017).

fraud.[148] In fact, the long history of the AKS peacefully co-existing with other similar state statutes implies the opposite.[149] Finally, there is no conflict preemption because it is not impossible to comply with both the state commercial bribery statute and the AKS.[150] It is actually quite easy to comply with both laws—simply do not engage in conduct that is illegal under the state commercial bribery statute, even if it is legal under AKS.

3. Double Jeopardy Concerns

When deciding how to charge individuals in corrupt health care payment cases, prosecutors may use any combination of the Travel Act, the state commercial bribery statute, and the federal Anti-Kickback Statute.[151] Given the similarities between these three charges, health care defense attorneys and defendants view the Travel Act as "nothing more than a veiled attempt by the Government to add volume - but not substance to its case."[152] Arguably, it is quite possible this prosecutorial method implicates the "second bite at the apple" theory.[153] However, a closer look at the statutory text resolves these qualms.

One must first recognize that the underlying state commercial bribery predicate involves different elements than the Travel Act itself. Under the Travel Act, the prescribed conduct is the "use[] [of] interstate facilities with the [requisite] intent to . . . promote [some] unlawful activity."[154] This is separate from the bare commission of acts which violate state law.[155] Section 1952 embodies "a clear Congressional determination, not to proscribe the underlying state substantive offense, but rather to prohibit the use of interstate facilities with the intention of promoting the substantive state offense."[156] As such, the federal interest exists solely because of the use of interstate facilities,

148 *Id*.

149 *Id*.

150 Pac. Gas & Elec. Co v. State Energy Res. Conservation & Dev. Comm'n, 416 U.S. 190, 204 (1983).

151 *See generally,* United States v. Greenspan, No. 16-114 (WHW), 2016 U.S. Dist. LEXIS 108856 at *56-58 (D.N.J. Aug. 16, 2016) (charging all three violations).

152 *Id*. at *42 (quoting ECF No. 7-12).

153 "Second bite at the apple" is an idiom meaning that one is given a second chance or opportunity to do the same thing. Critics of the Travel Act argue that it gives prosecutors a second (or third) chance to try their case, if their initial charges are not successful. *See generally* Smith, *supra* note 10, at 5.

154 McIntosh v. United States, 385 F.2d 274, 275 (8th Cir. 1967).

155 *Id.* at 275-76.

156 *Id.* at 278.

not because the state crime was committed.[157] In fact, the Travel Act does not even require consummation of the state offense, which makes a § 1952 violation noticeably different than a stand-alone state law violation.[158] Ultimately, the fact that a state can prosecute commercial bribery does not impinge upon a federal prosecutor's ability to charge a Travel Act violation.

As mentioned above, in *United States v. Greenspan*, Dr. Bernard Greenspan was indicted for his participation in a bribery and kickback scheme.[159] Since the remuneration scheme involved both a government-payor and privately-insured patients, Greenspan was indicted on both the federal Anti-Kickback Statute and Travel Act charges.[160] Defendant argued that these charges were "impermissibly multiplicitous" and must be dismissed.[161] However, the *Greenspan* Court was not convinced and recognized defendants can be subjected to multiple prosecutions for the same conduct if Congress's intent was to impose multiple punishments for that conduct.[162]

In particular, *Greenspan* addresses the double jeopardy issues arising from the concern that the Travel Act and the AKS charges are premised on the same act or transaction.[163] The *Greenspan* Court recognized this concern and allowed prosecutors to pursue both the Travel Act and the AKS charges for the same act or transaction so long as each statute requires a proof of fact that the other does not.[164] Prosecutors must be cognizant of an important limit—they "may not divide up 'one unit of prosecution' into pieces and convict a defendant separately of each piece."[165] The court held that the prosecutors were

157 The federal government's concern with interstate facilities is entrenched in Constitution Law principles outside this Comment's scope.

158 *McIntosh*, 385 F.2d at 276.

159 United States v. Greenspan, No. 16-114 (WHW), 2016 U.S. Dist. LEXIS 108856, at *40-41 (D.N.J. Aug. 16, 2016).

160 *See Id*. at *13. Defendant was also charged under the Honest Services Fraud statute, but that is outside the parameters of this Comment and does not change the AKS and Travel Act analysis.

161 *Id.* at *56-57.

162 *Id.* at *57 (citing United States v. Rigas, 605 F.3d 194, 204 (3d Cir. 2010)).

163 *Id*. at *57-58; The double jeopardy clause of the Fifth Amendment states, "No person shall . . . be subject to the same offense to be twice put in jeopardy of life or limb."; U.S. CONST. amend. V.

164 *Id.* at *56-58 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

165 *Id.* at *58; A historic example of "dividing up prosecution," is the 1777 English Case, Crepps v. Durden. Crepps was a baker who was convicted of four violations of a statute prohibiting a person "exercising his ordinary calling on a Sunday," because he sold four loaves of bread on a Sunday. It was improper that he was charged with four separate violations for the unitary course of conduct. *See* United States v. Lacy, 446 F.3d 448, 456 (3d Cir. 2006)(citing Crepps v. Durden, (1777) 98 Eng. Rep. 1283 (K.B.)).

not punishing Greenspan multiple times for one unit of acts, which would trigger double jeopardy concerns.[166] Rather, the government accused Greenspan of different individual acts because the bribes Greenspan was charged with under AKS were different than the bribes charged under the Travel Act.[167]

E. THE TRAVEL ACT'S UNANSWERED QUESTIONS

1. Safe Harbor Concerns

The Travel Act, the Anti-Kickback Statute (AKS), and state commercial bribery statutes regulate similar actions, which gives rise to the fear that the Travel Act will punish actions that the AKS's statutory and regulatory safe harbors protect.[168] The AKS's safe harbor provisions were promulgated in response to the concern among health care professionals that many seemingly innocuous and, perhaps beneficial, commercial arrangements were subject to prosecution under the AKS.[169] Legal commentators, however, worry that the Travel Act erases the safe harbor's effectiveness in light of the Travel Act's expansive reach.[170] Congress initially enacted the AKS to stop "certain practices which have long been regarded by professional organizations as unethical … and which contribute[d] appreciably to the cost of [M]edicare and [M]edicaid programs."[171] However in the 1980s, Congress recognized that the AKS may be too broad and was chilling legitimate health care arrangements.[172] Because of this worry, Congress instructed the Department of Health and Human Services to promulgate safe harbors to exclude certain beneficial payment practices from possible AKS prosecution.[173]

As a relatively new prosecutorial tool, health care compliance attorneys may not immediately realize how the Travel Act and its underlying state commercial bribery statutes are implicated within the AKS safe harbor-protected activities. Attorneys who are aware of the

166 *Id.*

167 *Id*. at *58-59.

168 *See* 42 U.S.C. § 1320a-7(b)(3) (2018); *see also* 42 C.F.R. § 1001.952 (2016); "Safe harbors" are needed because the federal Anti-Kickback Statute makes certain beneficial practices illegal, such as physicians offering discounts to underprivileged and unserved communities.

169 United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *22 (N.D. Tex., Sept. 20, 2017) (quoting 54 Fed. Reg. 3088-01, 3088 (Jan. 23, 1989)).

170 Barnett, *supra* note 63.

171 H.R. REP. NO. 92-231 at 107 (1971).

172 S. REP. NO. 100-109, at 27 (1987).

173 *See* 42 U.S.C. §1320a-7d(a).

overlap between health care statutes and the Travel Act fear that their health care provider clients who comply with the AKS may still nonetheless violate the Travel Act.[174] This is problematic because health care providers frequently rely on health care attorneys' advice regarding the AKS's safe harbor protections, and they subsequently engage in protected actions based on this advice.[175]

Even if a person acts in accordance with a safe harbor provision, the individual may still violate the Travel Act. In order to violate the Travel Act, one must *intend* to promote, manage, carry on, or facilitate any "unlawful activity."[176] This is a lower *mens rea* requirement than the AKS's "knowing and willful" standard, making it possible to violate the Travel Act even if one does not violate the AKS or relies on a safe harbor-protected payment practice. For example, the AKS's safe harbor will protect physicians collecting rent for spaces within their practices if the rental agreement constitutes a *bona fide* lease under the AKS's regulations.[177] If an individual accepts the payment, however, with the intent to facilitate an unlawful activity, such as commercial bribery, that individual still faces possible criminal prosecution under the Travel Act. Prosecutors, however, have discretion in bringing Travel Act charges. As such, it may be unlikely that a prosecutor will bring Travel Act charges against an individual who has expressed their intent to operate within the AKS safe harbor. But, there is still a chance that the Travel Act may defeat the purpose of the AKS if the decision to charge a Travel Act violation is left solely to prosecutorial discretion.

As with preemption issues discussed above involving the AKS and the Travel Act's underlying state commercial bribery predicates, health care professionals and their attorneys must be aware of all statutes. There is nothing in the AKS or its regulations that suggest the AKS is the sole and exclusive means of prosecuting corrupt health care payment practices.[178] Although safe harbors protect individuals from liability *under the AKS*, the safe harbors are not a blanket permission to violate other laws, including the Travel Act.[179] Attorneys often work within the framework of multiple statutes applying to their clients' professional ventures, so why should the Travel Act be any different?

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174 *See* Smith, *supra* note 10; Feld, *supra* note 62.

175 *See generally*, Smyer & Falzarano, *supra* note 38.

176 18 U.S.C. § 1952 (2014).

177 *See* 42 C.F.R. § 1001.952 (2016).

178 *See* United States v. Barker, No. 3:16-CR-516-D, 2017 U.S. Dist. LEXIS 152475, at *30 (N.D. Tex., Sept. 20, 2017.

179 *See* 42 U.S.C. § 1320a-7b(b)(3) (2018) (enumerating safe harbors to the AKS provisions); 42 C.F.R. 1001.952 (asserting that the following safe harbor-protected payment practices should not be treated as criminal offenses under the AKS).

2. The Fiduciary Problem

Despite the fact that the Travel Act can function as a gap-filler, the statute has not fully addressed all possible corrupt payment schemes. Because the Travel Act relies on state commercial bribery statutes, Travel Act violations typically require a breach of a fiduciary duty or "duty of fidelity."[180] Many doctors may fall under the Travel Act if they agree to accept bribes and kickbacks due to the fiduciary duty they owe to their patients under state statutes.[181] It is difficult, however, to prove that certain health care administrators, consultants, and other actors in the greater health care system owe a fiduciary duty.[182] As such, the Travel Act cannot reach those who do not owe a fiduciary duty but choose to engage in corrupt remuneration schemes involving private-payor insurance. Ultimately, this makes the Travel Act narrower than the traditional federal Anti-Kickback Statute, which prohibits anyone, not just a physician with a fiduciary duty, from participating in illicit kickback schemes.[183]

IV. Conclusion

This Comment has explored the various implications of the federal government's relatively new and aggressive method of prosecuting health care enforcement actions under the Travel Act. After rigorous scrutiny, many fears surrounding the Travel Act are unwarranted. The Travel Act does not give prosecutors unlimited power to pursue all prosecutions, including those involving legitimate and proper health care arrangements. Rather, § 1952 extends traditional and well-known prosecutorial methods into the private-payor realm.

Again, § 1952 violations are not just "a veiled attempt by the government to add volume-but not substance to its case."[184] The federal government and its agencies have a real interest in pursuing private-payor schemes because Travel Act violations involve interstate facilities and important health care systems. Although health care attorneys may fear this seemingly new prosecutorial method, the solution is education.

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180 *See e.g.* N.J. STAT. ANN. § 2C:21-10 (West 1986) (requiring fiduciary duty); TEX. PENAL CODE ANN. § 32.43 (West) (requiring fiduciary duty).

181 *See* United States v. Greenspan, No. 2:16-cr-00114-WHW, 2016 U.S. Dist. LEXIS 108856, at *55-56 (D.N.J. Aug. 16, 2016).

182 *See e.g.* N.J. STAT. ANN. § 2C:21-10 (West 1986) (listing agents, trustees, guardians, physicians, lawyers, accountants, directors, and officers as individuals who owe a duty of fidelity).

183 *See* 42 U.S.C. § 1320a-7b.

184 *Greenspan*, 2016 U.S. Dist. LEXIS 108856, at *42 (quoting ECF No. 7-12 at 29).

It is extremely important for attorneys to analyze and research the Travel Act's statutory language, along with applicable state commercial bribery laws, to best assist their clients in creating compliant health care practices. Further legal research and education for attorneys in the health care space is especially warranted because the U.S. Attorney General's office has reaffirmed its interest in pursuing health care fraud and abuse prosecutions under many different federal statutes.[185] Because the federal government can now aggressively pursue corrupt payment schemes involving both government-payor and private-payor insurance, a comprehensive understanding of the Travel Act will be consequential moving forward.

185 Feld, *supra* note 62.